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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 581 F.2d 1092. The opinion of the district court (Pet. App. 15a-70a) is reported at 435 F. Supp. 166.

JURISDICTION

The judgment of the court of appeals (Pet. App. 71a) was entered on July 27, 1978. A motion to

amend the opinion was denied on September 13, 1978 (A. 12). On October 16, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 24, 1978, and on November 14, 1978, he further extended the time to and including December 24, 1978. The petition was filed on December 21, 1978, and granted on February 21, 1979 (A. 145). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a claim for medical malpractice under the Federal Tort Claims Act "accrues" when the claimant knows both the existence and cause of the injury, even if he does not know that the infliction of the injury amounted to negligent medical practice.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. 28 U.S.C. 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

STATEMENT

1. Respondent was admitted to a Veterans Administration hospital in April 1968 for treatment of an infection in his right femur. After surgery the infected area was irrigated continuously for 12-13 days with a solution of the antibiotic neomycin sulfate (Pet. App. 15a). In June 1968 respondent noticed a ringing in his ears and some loss of hearing (*id.* at 23a). His family physician referred him to a private ear specialist, who diagnosed his condition in August 1968 as bilateral nerve deafness (*ibid.*). In November 1968 respondent consulted another ear specialist, Dr. Joseph Sataloff, who requested VA records to determine whether respondent had received any drug during his hospitalization that could have caused a

hearing loss (*id.* at 23a-24a). On January 10, 1969, after examining the VA's records, Dr. Sataloff told respondent that the VA's administration of neomycin probably had caused his hearing loss.[1]

Respondent already was receiving VA disability benefits for a service-connected back injury. In April 1969 he applied for an increase in those benefits pursuant to 38 U.S.C. 351,[2] alleging that the administration of neomycin by a VA surgeon had caused his hearing loss (A. 7). Respondent's application stated that the basis of his claim was a "bilateral defective

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[1] Respondent testified (A. 68) that Dr. Sataloff told him that his hearing loss "could possibly be caused by the drug neomycin" (A. 68). Dr. Sataloff testified that he had "a note that I told [respondent] that it was neomycin that caused his hearing loss" (A. 131). He later wrote to the VA that there "is a very excellent possibility" (A. 132) that the administration of neomycin caused the deafness. The district court declined to credit Dr. Sataloff's testimony that he had given respondent a firm opinion that the neomycin caused the deafness. The court found "that Dr. Sataloff told [respondent] and reported to the Veterans Administration, insurance companies, and others that it was his opinion that it was 'highly possible' (or other similar language) that the hearing loss was caused by the neomycin solution" (Pet. App. 24a).

[2] 38 U.S.C. 351 provides that a veteran is entitled to disability benefits "in the same manner" as if such disability "were service-connected" in the event that he suffers "an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment" administered by the VA. Under the implementing regulations, 38 C.F.R. 3.358 (c) (3), an applicant for benefits must show that "the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgement, or similar instances of indicated fault on the part of the Veterans Administration."

hearing condition [that was] the result of medication proscribed [*sic*] during my period of hospitalization" (A. 7). He identified Dr. Sataloff as his authority for stating that his hearing loss was attributable to the treatment (*ibid.*). A medical board reviewed the application in August 1969, stating that neomycin was known to cause deafness only when administered "systemically," not when administered to a discrete wound (A. 13). Administration of neomycin of the kind used in petitioner's case was "common practice at this hospital * * * and adverse reactions are unknown" (A. 13). Consequently, the VA medical board's report concluded, there is "no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the government" (A. 14). Respondent was notified by a letter dated September 5, 1969, from an Adjudication Officer in the VA's Philadelphia office that his claim was disallowed because it had been determined that the hearing loss he alleged "is not medicinally or medically attributable to" his VA hospitalization (A. 15). Respondent later testified that this letter "meant * * * that the decision made a mistake" and that he "assumed it was * * * a medical error [because] * * * the neomycin did cause my hearing loss" (A. 74).

On September 25, 1969, respondent filed another statement in support of his claim for disability benefits. This statement asserted that the neomycin caused his deafness, explaining that he had been informed by Dr. Sataloff that "the medication * * * was definately [*sic*] responsable [*sic*]" for his loss of hearing

(A. 8-9). The VA sent respondent a "Statement of the Case" dated September 26, 1969 (A. 16-20) and a confirmation of the denial of his claim dated September 29, 1969 (A. 21-22). These documents were to be used by respondent as aids in completing his appeal (A. 16). The VA stated once again that "the topical use of neomycin in solution in the irrigation process is medically acceptable and proper following surgery" (A. 22) and that the "package literature" (a summary of a drug's effects that the FDA requires to be provided to physicians) stated that hearing loss occurred only after systemic use of neomycin (A. 19, 22). Respondent's treatment did not involve systemic use of the drug, it was maintained (A. 19, 22). The September 29 decision reiterated that no "carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration" had been shown and reaffirmed the decision of September 5 (A. 22).

In December 1969 respondent, pursuing an administrative appeal, sent the VA a six-page statement titled "Disagreement of Facts of the Issue," in which he took issue with the VA's "Statement of the Case" (A. 83-84, 117-126). One point of contention was the question whether deafness, which the package literature warned could result from systemic use of neomycin, also could result from using the drug to irrigate a wound. Respondent asserted (A. 121):

> There is also a difference of opinion in the statement about the adverse reaction mentioned on the packaged [*sic*] literature. It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by [*sic*] if enough high blood level of the drug was reached.

The Board of Veterans Appeals remanded the case for consideration of further evidence (A. 23-28). Following the remand the Board summarized the history of the case and concluded that "the defective hearing may have been caused by the neomycin irrigation" (A. 47). The Board also concluded, however, that the neomycin was administered "in accordance with acceptable medical practices and procedures" (A. 47). Accordingly, on August 9, 1972, the Board affirmed the denial of the claim (A. 47-48).

While his case was pending before the VA, respondent and his wife wrote letters to various VA officials and to United States Senators protesting the denial of his claim and contradicting the VA's initial finding that there was no causal connection between the use of neomycin and his deafness (Pet. App. 4a, 28a, 28a-29a n.3). In a letter to Donald Johnson, Administrator of the VA, dated October 15, 1970, respondent admonished the Administrator: "Please keep in mind I have already gone through much, when I lost my Hearing as a result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources" (A. 10). Respondent and his wife also consulted medical reference sources on neomycin (A.

121-122) and solicited the opinions of physicians and drug specialists on the ototoxic properties of neomycin. They received responses indicating disagreement with the VA's statements that neomycin is safe when used as an irrigating solution (A. 35, 81, 106).

In May 1971 the VA sent respondent a "Supplemental Statement of the Case," which contained a report stating that Dr. J. J. Soma, the first private ear specialist he had consulted, had suggested to a VA field examiner that respondent's deafness was related to his previous occupation as a machinist (Pet. App. 26a-27a; A. 90). In June 1971, when respondent questioned him, Dr. Soma denied making the statement and further told respondent not only that the neomycin had caused his deafness but also that it should not have been administered (*ibid.*). Several weeks later, on the advice of another ear specialist, respondent consulted an attorney (Pet. App. 5a). The district court found that respondent "did not, prior to his June 1971 interview with Dr. Soma, suspect that there was negligence involved" (Pet. App. 29a).

2. Respondent filed this Federal Tort Claims Act suit in September 1972, alleging that he had been injured by negligent treatment in the VA hospital (Pet. App. 5a; A. 5-6). He filed his administrative tort claim with the VA on January 13, 1973 (Pet. App. 30a).[3] The VA rejected the claim as untimely.

[3] According to 28 U.S.C. 2675(a), a suit may not be brought under the Act unless a tort claim has been filed in writing with the agency concerned and the agency has either denied

In court, the United States denied negligence and also defended on the ground that the suit was barred because an administrative claim had not been filed with the agency within the Act's two-year limitations period, 28 U.S.C. 2401(b), which begins running when the claim "accrues."[4]

Following a trial the district court found that the neomycin treatment had caused respondent's deafness (Pet. App. 32a-41a), that the treatment constituted medical malpractice (*id.* at 62a-69a), and that respondent's claim is not time-barred (*id.* at 47a-61a). It entered judgment for respondent in the amount of $320,536 (Pet. App. 72a).

In arguing that the claim was not timely filed, the government had contended that respondent's claim

it or failed to rule on it within six months. (The two-year limitations period set by 28 U.S.C. 2401(b) is keyed to the filing of the administrative claim.) The government objected to the premature filing of the suit, but the district court found the objection moot when the VA denied the claim on April 13, 1973. Because respondent could have simply re-filed in April, and the suit still would have been timely under the district court's view of the statute of limitations, the government chose not to raise the issue on appeal.

[4] The claim filed by respondent seeking enhanced VA benefits was not an administrative claim for purposes of the Tort Claims Act because it did not allege negligent conduct or seek a sum certain as damages. Respondent has never argued that his 1969 claim with the VA, or the subsequent proceedings, may be treated as a claim under the Tort Claims Act. Respondent had independent rights, and resort to one did not toll the time within which to resort to the other. *Electrical Workers* v. *Robbins & Myers Inc.*, 429 U.S. 229 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). See also note 15, *infra*.

accrued at the latest in April 1969, when his application for disability benefits demonstrated that he knew there was a causal connection between the neomycin treatment and his deafness. In rejecting the government's argument, the district court held that respondent's claim did not accrue until June 1971, when Dr. Soma told him that the use of neomycin had been improper (Pet. App. 61a). The court held "that where the patient perceives the relationship between treatment and injury but, notwithstanding diligence, has no reason to believe that there was any negligence in the treatment, the statute does not begin to run" (*id.* at 50a-51a). The government appealed from the ruling on the statute of limitations issue.

3. The court of appeals affirmed in substantial part.[5] The court began its discussion with the generally accepted rule of *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962), that "a claim for malpractice accrues against the government when the claimant discover[s], or in the exercise of reasonable diligence, should have discovered, the acts constituting the alleged malpractice." It observed that in most

[5] It remanded on one issue. In 1975 the VA reversed its earlier decision and awarded respondent an increase in disability benefits (A. 51-56). The court of appeals held that the increase in disability benefits must be deducted from the damages awarded in tort. The case was remanded for a reduction of the judgment (Pet. App. 14a). Under the terms of 38 U.S.C. 351, if the judgment for respondent is upheld, the increment in future monthly VA benefits attributable to his hearing disability cannot be paid to him "until the aggregate amount of benefits which would be paid but for this [provision] equals the total amount included in such judgment * * *."

cases knowledge of the causal connection between a particular treatment and injury should alert a reasonable person to the possibility of an "actionable wrong," but it stated that in a "few instances" knowledge of such a nexus would not be sufficient to suggest to a reasonable person the possibility that the treatment was improper (Pet. App. 10a). In those cases, according to the court of appeals, the limitations period is tolled (*ibid.*).

The court stated that subjective as well as objective standards must be applied to determine when the claim accrues. Thus, for example, the training and relative sophistication of the plaintiff could be considered in determining whether he was on notice of possible negligence. The factors that led the court to conclude that respondent's claim did not accrue until the 1971 conversation with Dr. Soma were the technical complexity of the question whether the neomycin treatment was excessively risky, the failure of physicians to suggest before 1971 that there had been negligence, and the VA's denials of causation when respondent sought increased disability benefits for his hearing loss (Pet. App. 11a).

The court of appeals acknowledged that as early as 1969 respondent had written letters arguing that the neomycin treatment was mistaken, but it concluded that the district court was not clearly in error in finding that respondent had been referring to the VA's denial of additional benefits rather than to malpractice (Pet. App. 11a-12a). The court concluded that respondent did not know and could not

be expected to know that administration of the drug was "medical negligence" until that conclusion was suggested by a physician. In summing up the basis for its holding that the claim did not accrue until June 1971, the court stated (Pet. App. 12a):

> * * * Thus, [respondent] knew [in 1969] two of the essential elements of a possible cause of action—causation and damages—but he did not know, nor could he reasonably have been expected to know, according to the district court's findings, of the breach of duty on the part of the government. In these circumstances, the limitation period did not run until Dr. Soma's conversion suggested a duty had been breached by the Veterans Administration.

SUMMARY OF ARGUMENT

A tort claim against the United States must be filed "within two years after [the] claim accrues." 28 U.S.C. 2401(b). A tort claim usually "accrues" on the date of the tortious acts. When a tort produces hidden injury, however, the claim usually "accrues" when the injury becomes manifest and its cause is or should be identified. *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949). The court of appeals here amended this "causal connection" approach by adding another requirement: the injured person must know that the act causing the harm could be characterized as "negligent." In the present case this additional requirement postponed the "accrual" of the claim by almost three years, to the date when a physician bluntly told respondent that the treatment he had received was medical malpractice.

This holding subverts the purpose of the statute of limitations. It rests on the assumption that a statute of limitations does not begin to run until a prospective plaintiff's investigation of the injury is so far advanced that he could file suit almost immediately. But statutes of limitations are designed to induce prospective plaintiffs to investigate and act; they are not designed to offer a period of leisure between the completion of an investigation and the filing of suit. Statutes of limitations can achieve their purposes only if they start to run once a person knows, or should know, that he has been harmed. Knowledge of the existence and cause of harm marks the place at which investigation of the claim can begin. The aggrieved party then is in a position to consult with physicians, attorneys, and other advisers, and to file suit if necessary. The statutory period sets a limit on the length of this investigation and deliberation. Congress established two years as the appropriate time. Respondent, after learning of both the harm and its cause, took four. That was two too many.

The legislative history of the Federal Tort Claims Act shows that Congress intended the period of limitations there to serve the traditional function. The committee reports stated Congress' concern that claims be filed before they become stale and evidence becomes difficult to assemble. When Congress later extended the limitations period to its current length, the committee reports strongly implied that a claim accrues on the date of the tortious acts, even if the

harm is not discovered until some time later. The legislative history thus demonstrates that the date of "accrual" should not lightly be postponed. Indeed, postponement is particularly inappropriate where, as here, this Court must interpret a statute that waives the sovereign immunity of the United States. Such statutes traditionally have been construed in favor of the government.

The rule that a malpractice claim "accrues" when the victim knows that he has been harmed by a particular medical treatment is not unfair. The limitations period does not begin to run until the potential plaintiff learns (or should have learned) the connection between a known harm and the acts producing it. The two years following this discovery of the causal connection are ample to investigate, obtain medical and legal assistance, and file an administrative claim. The rule for which we argue does not penalize blameless ignorance; it simply encourages prompt investigation and action, which any statute of limitations should do.

The fact that a medical malpractice case may be complex is not a reason for deferring the accrual of the claim. Congress presumably took the complexity of some tort cases into account in setting the limitations period at two years rather than some shorter time. A court cannot properly rely on the complexity of a particular case to extend the period.

Moreover, the court of appeals' suggestion that the VA's denials of liability postponed the accrual of the claim is unwarranted. Many persons charged with tortious conduct will deny blame. Unless the denial

contains misleading or false information that confuses or lulls a victim, it should not toll the statute. Nothing the VA said confused or lulled respondent.

Finally, the district court's observation that respondent diligently prosecuted a claim before the VA for an increase in disability benefits is irrelevant. Pursuit of one remedy does not extend the time in which to invoke another. *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

In sum, the court of appeals' interpretation of the statute of limitations undermines its reason for being. If respondent's claim is timely, many future litigants will be substantially unconstrained by the statute so long as they do not vigorously pursue their claims or ask the right questions of the right people. Such a rule, which makes sleeping on one's rights a reason for extending the time within which to file a claim, is incompatible with the history and purposes of the Federal Tort Claims Act.

ARGUMENT

A CLAIM FOR MEDICAL MALPRACTICE UNDER THE FEDERAL TORT CLAIMS ACT "ACCRUES" WHEN THE CLAIMANT KNOWS BOTH THE EXISTENCE AND CAUSE OF THE INJURY, EVEN IF HE DOES NOT KNOW THAT THE INFLICTION OF THE INJURY AMOUNTED TO NEGLIGENT MEDICAL PRACTICE

A. The Rule for Accrual of a Claim Should Encourage Prompt Investigation and Action

A tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after

[the] claim accrues." 28 U.S.C. 2401(b). The Act specifies no standard for determining when a claim "accrues." The traditional rule is that a claim accrues on the date that all of the elements giving rise to the right to recover have come into existence. In the case of most torts this is the date on which actual harm is produced by a wrongful act. *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200-1201 (1950); W. Prosser, *Handbook of the Law of Torts* 177-178 (1941). The traditional rule is obviously appropriate with regard to actions, such as most personal injury suits, in which the wrongful act and resulting harm are almost simultaneous and the causal connection therefore immediately evident.

As this Court held in *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949), however, a different rule is appropriate in cases in which the harm from the wrongful act is hidden for some time. So long as the harm is not manifest, the victim could not be expected to be concerned or to have any basis for redress. Even though a right of recovery sometimes may be available as soon as a wrongful act has occurred, the claim should not "accrue" for the purpose of a limitations provision until the victim knows, or can be expected to know, that an act or acts caused him harm. *Ibid.*

Quinton v. *United States*, 304 F.2d 234 (5th Cir. 1962), held that the *Urie* rule applies to medical malpractice claims under the Federal Tort Claims Act. According to *Quinton*, a malpractice claim against the United States accrues when the victim

"discover[s], or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." 304 F.2d at 240. We understand this to mean that an administrative claim must be filed within two years after the victim discovers or should have discovered (a) that he suffered harm, and (b) the cause of the harm. We accept the rule, as so understood, as the proper one for malpractice claims under the Act.[6]

The court of appeals in the present case added a third element to the formula—knowledge that the act causing the harm may be characterized as medical negligence.[7] Although the court purported to limit its

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[6] Because the date on which the two years begins to run depends on the construction of a federal statute, it raises a question of federal law. Only the First Circuit looks to state law to determine the time at which the claim accrues. See *Hau* v. *United States*, 575 F.2d 1000, 1002 & n.2 (1st Cir. 1978) and cases there cited; *DeWitt* v. *United States*, 593 F.2d 276 (7th Cir. 1979); *Exnicious* v. *United States*, 563 F.2d 418, 420 n.6 (10th Cir. 1977); *Sanders* v. *United States*, 551 F.2d 458, 460 (D.C. Cir. 1977); *Reilly* v. *United States*, 513 F.2d 147, 148 (8th Cir. 1975).

[7] The *Quinton* approach—without the Third Circuit's elaboration—became the generally accepted rule. Until 1977, decisions applying *Quinton* either stated or were consistent with the view that the claim accrues as soon as the victim knows or should know both the existence of harm and the cause of that harm. See, *e.g.*, *Caron* v. *United States*, 548 F.2d 366 (1st Cir. 1976) (claim accrued when harm became apparent and cause was diagnosed years after the treatment); *Kossick* v. *United States*, 223 F. Supp. 720, 721 (S.D.N.Y. 1963), aff'd, 330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964) (claim barred); *Toal* v. *United States*, 438 F.2d 222 (2d Cir. 1971) (paraplegia from post-operative bleeding initially confused with consequences of congenital spine

discovery rule to special circumstances, the limitations are illusory and the rule itself improper. Al-

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tumor; claim accrued when confusion was dispelled); *Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (claim accrued under same circumstances as *Caron*); *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975) (claim barred); *Hulver* v. *United States*, 562 F.2d 1132 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (claim barred); *West* v. *United States*, 592 F.2d 487 (8th Cir. 1979) (claim barred); *Hungerford* v. *United States*, 307 F.2d 99 (9th Cir. 1962) (claim barred); *Brown* v. *United States*, 353 F.2d 578, 580 (9th Cir. 1965) (claim barred); *Ashley* v. *United States*, 413 F.2d 490 (9th Cir. 1969) (claim barred). In *Quinton* itself the Court of appeals held that a claim arising out of a woman's inability to bear a child, caused by improper blood transfusions given in 1956, accrued in June 1959, when during the woman's pregnancy the consequences of the transfusion first became apparent. 304 F.2d at 235.

Since 1977, however, several courts have announced that the period of limitations does not begin to run until the claimant has a "reasonable opportunity" to discover "duty, breach, causation, and damages." The courts following this approach have treated knowledge of "breach" as knowledge that the complained-of acts were tortious. These cases therefore announce a rule similar to the approach of the Third Circuit here. See *Bridgford* v. *United States*, 550 F.2d 978 (4th Cir. 1977); *DeWitt* v. *United States*, *supra*; *Exnicious* v. *United States*, *supra*, 563 F.2d at 420. Whether or not these cases were correctly decided on their facts, the test they announce is fundamentally inconsistent with the approach followed by the cases cited in the previous paragraph. (The rule in the Sixth Circuit is unclear. Although *Jordan* v. *United States*, 503 F.2d 620, 624 (6th Cir. 1974), appears to use language similar to that of the Third Circuit, and was relied on by the court of appeals here (Pet. App. 8a-10a), the case may be more properly understood as one in which the claimant did not know the cause of his injuries for some time, and filed a claim within two years of learning the cause. See *Casias* v. *United States*, 532 F.2d 1339 (10th Cir. 1976), which gives *Jordan* this reading.)

though we discuss below the principles of statutory construction and the legislative history that support our position, the principal objection to the court of appeals' holding is that its approach is at odds with the reasons for having a statute of limitations.

Statutes of limitations are designed to induce prospective plaintiffs to investigate possible claims promptly and to sue before evidence becomes stale and memories fade. Statutes of limitations can achieve these purposes only if they start to run once a person knows, or should have known, that something is amiss. The knowledge of harm and the identity of its source marks the place at which investigation can begin. The aggrieved person can consult physicians, attorneys, and advisers of all sorts. The system of notice pleading and liberal discovery implemented by the Federal Rules of Civil Procedure allows still further investigation after a suit has been filed. The statutory period of limitations establishes how much of this investigation should be permitted before suit (or, under the Tort Claims Act, an administrative claim) is filed. Congress chose two years as the appropriate period under the Tort Claims Act. Respondent, after learning of both the harm and its cause, took four. That was two too many.

The court of appeals appears to have assumed that the period of limitations is not a time for investigation. It is, in the court's view, a time for repose. Nothing else can explain the court of appeals' conclusion that the time does not even begin to run until the prospective plaintiff knows everything necessary

to file suit—he must know not simply that he has been harmed, and by whom, but that a physician (and perhaps an attorney?) considers the harm actionable on the basis of thoroughly-investigated facts. Application of the rule in this case meant that respondent was rewarded with two additional years' time because he never put to the many physicians he consulted the plain question: "Was the treatment negligent?" Neither the district court nor the court of appeals concluded that respondent *could* not have obtained a physician's answer to that question during the two years after he learned the cause of his deafness; it was enough, they held, that he *did* not. This effectively means that the running of a statute of limitations may be suspended because a potential plaintiff was careless or inefficient in the investigation of his claims, the very thing that the period of limitations is designed to prevent. The court of appeals' approach reduces the incentive for a potential plaintiff to obtain medical or legal advice; rather than going to physicians, future victims can wait for physicians to come to them.

B. The Nature of the Federal Tort Claims Act as a Waiver of Sovereign Immunity and the Legislative History of Its Limitations Provision Show That the Claim Accrues When the Connection Between the Act and the Harm Is Established

The Federal Tort Claims Act creates a right of recovery against the United States and waives sovereign immunity to a specified extent. Because only Con-

gress can waive sovereign immunity, a court cannot excuse noncompliance with any provision of the Tort Claims Act. Each is a precondition to recovery. *Munro* v. *United States*, 303 U.S. 36, 41 (1938).[8] Moreover, because the limitations provision in 28 U.S.C. 2401(b) is a condition of the government's waiver of sovereign immunity, its terms "must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See also *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941). A court, of course, must interpret the statutory language in determining when the limitations period began to run in a particular case, but this process of interpretation is guided by the rule of strict construction. A court surely is not free to invent a definition of "accrual" that is at odds with the legislative history of the Act. Yet that is what the court of appeals has done.

The statute of limitations was enacted in 1946 as part of the original version of the Tort Claims Act. 60 Stat. 845. It set the limitations period at one year from the date of a claim's accrual. The legislative history does not indicate that Congress considered how to determine when a claim accrues or whether the time of accrual might depend on the nature of the

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[8] See also Gottlieb & Young, *Medical Malpractice and the Limitations Under the Federal Tort Claims Act*, 13 Def. L.J. 257, 262-263 (1964); *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1187-1188 (1950).

claim asserted.[9] It is clear, nevertheless, that by including the provision Congress sought to achieve purposes that limitations periods traditionally have been understood to serve.

Limitations periods commonly are employed to induce potential plaintiffs to pursue their remedies promptly or not all; to spare courts the burden of adjudicating, and defendants the burden of litigating, stale (and possibly fraudulent) claims regarding which relevant evidence may have become more difficult to obtain; and to protect society's reasonable expectations that events long past will not be resurrected as the basis for claims that may disrupt the orderly planning of daily affairs. As this Court explained shortly before Congress enacted the Tort Claims Act (*Order of Railroad Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

[9] The Senate Report on S. 2177, 79th Cong., 2d Sess., (1946), the Legislative Reorganization Act of 1946, which contained the provisions that became the Federal Tort Claims Act, offers only a paraphrase of the provision that sheds no light on the meaning of the term "accrued." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). The Federal Tort Claims Act was conceived as an element of the legislative reorganization plan because it removed from Congress the burden of enacting private bills to provide relief for citizens with tort claims against the government. *Id.* at 7; *Feres* v. *United States*, 340 U.S. 135, 140 (1950).

See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974).

Similar concerns were expressed in Congress during deliberations on tort claims bills preceding the one finally enacted. Short limitations periods were urged, for example, as necessary to assure that relevant evidence would be sufficiently fresh to permit the detection of fraudulent claims. See, *e.g.*, H.R. Rep. No. 2800, 71st Cong., 3d Sess. 5 (1931); *Hearings on H.R. 5065 Before the Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 14 (1932). Moreover, in commenting on a six-month notice requirement in S. 1912, 69th Cong., 1st Sess. (1926), a sponsor of that bill explained the special need for such a provision where government activities are the basis for suits:

> The trouble in so many of these governmental claims is that if you extend the period longer than the proposed six months, the witnesses to the accident have all gone. For instance, in the War and Navy Departments they are transferred to the Philippines or to some distant post and consequently can not be secured to appear before the court or appear before the commission. In the Post Office Department, with its

> constantly shifting employment from one city to another you find that the same thing occurs.

67 Cong. Rec. 11087 (1926) (remarks of Rep. Underhill).

Although Congress prescribed a longer limitations period in the statute enacted in 1946, and in 1949 extended that period to two years (63 Stat. 62), it did not abandon its concern for the purposes served by the limitations provision. *Pittman* v. *United States*, 341 F.2d 739, 741 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965). The House Report on the proposed amendment explained that the extension to two years would make the federal limitations period equal to the average length of limitations periods applicable to tort actions in state courts. (H.R. Rep. No. 276, 81st Cong., 1st Sess. 2-3 (1949)); it defended this length as a "happy medium" that would not "foster a lack of diligence on the part of claimants in the prosecution of their claims" (*id.* at 4). It disclaimed any intent to "harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence." *Ibid.*

There is no indication that the committee issuing the 1949 report considered how to determine when a claim accrues, but the report seems to assume that a claim accrues at least as soon as an injury (in the physical, not the legal, sense) first manifests itself to a substantial degree. Thus the report explains the unfairness of the one-year period in these terms (H.R. Rep. No. 276, *supra*, at 3-4):

> The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim. Moreover, the wide area of operations of the Federal agencies, particularly the armed-service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit.

These comments in the House report provide a basis for concluding that a claim cannot properly be held to accrue at any point after an injury manifests itself—*i.e.*, that even the "discovery" rule expressed in *Quinton* and *Urie* is too favorable to plaintiffs. We do not urge that position here, because it is supported by no more than a negative implication from a committee report, but the 1949 history of the Act strongly undermines the court of appeals' "knowledge of malpractice" rule. The committee's remarks, together with the reiteration throughout the legislative history of the Act and its amendments of a concern for avoiding litigation of stale claims, suggests that courts must be cautious in altering the traditional tort limitations rule.

In 1966 Congress amended the Act to make presentation of a claim in writing to an agency a prerequisite to suit on any claim.[10] 80 Stat. 307. Con-

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[10] The limitations provision in the 1946 Act required presentation of a claim to the federal agency concerned only if the claim was for $1,000 or less. Suits on claims exceeding that amount could be brought without prior agency consideration and would be timely if suit was brought within one year from the date of accrual. 60 Stat. 845.

gress again failed to specify what it meant by the reference to a claim's accrual, but in explaining the reasons for giving agencies greater authority to settle tort claims (another change made in 1966), the House and Senate committees responsible for the legislation again expressed concern for avoiding the necessity of litigating stale claims. S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess. 6 (1966).

If the 1966 amendments threw little light on Congress' understanding of the rule for determining when a claim accrues, provisions of another statute, enacted the same day as those amendments suggest that Congress well understood the difference between an ordinary limitations period and one in which the time for filing a claim is tolled until the potential litigant learns of his legal rights. 28 U.S.C. 2415 and 2416 establish a time limitation for actions commenced by the United States. The statute includes a three-year limitation on certain types of tort actions, beginning "after the right of action first accrues." 28 U.S.C. 2415(b). 28 U.S.C. 2416 specifies "exclusions" from the prescribed limitations periods, one of which is an exclusion of any period during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances * * * ." 28 U.S.C. 2416(c). This suggests that, in the view of Congress, a limitations period ordinarily begins to run whether or not all of the material facts are

known by the potential plaintiff. Only an exclusion can suspend the running of time. And even the exclusion provided in 28 U.S.C. 2416(c) covered only unknown *facts*, rather than (as here) unknown medical or legal judgments based on known facts. In the Tort Claims Act, of course, there are no exclusions from the limitations period. This shows, at the least, that a court should not stray far from traditional understandings of how statutes of limitations operate in construing 28 U.S.C. 2401(b).

C. This Court Has Applied a Causal Relationship Standard in Defining the Accrual of a Claim

The court of appeals in this case described the *Quinton* "test of 'discovery of the existence of the acts of malpractice upon which the claim is based'" as being "apparently precise" but "troublesome in the application" (Pet. App. 7a). The test is "troublesome" only if one ignores the decision of this Court in *Urie* v. *Thompson*, *supra*, on which *Quinton* principally relied. *Quinton* v. *United States*, *supra*, 304 F.2d at 240-241.[11]

[11] The *Quinton* court also cited a trend in the states—by legislation and judicial construction—away from the "majority rule that a cause of action accrues on the date of the negligent act, even though the injured patient is unaware of his plight." *Id.* at 240. This trend continued in the years following *Quinton* (see, *e.g.*, Note, *Medical Malpractice: A Survey of Statutes of Limitation*, III Suffolk U.L. Rev. 597, 614-615 (1969)); but a trend away from the discovery act has become evident as state legislatures attempt to cope with increasing numbers of medical malpractice suits. Note, *A Study of Medical Malpractice Insurance: Maintaining Rates and Availability*, 9 Ind. L. Rev. 594, 615 (1976).

The limitations question in *Urie* concerned the timeliness of a suit filed by a railroad worker under the Federal Employers' Liability Act, 45 U.S.C. (1940 ed.) 51 *et seq.*, to recover damages for his contraction of silicosis as a result of many years of inhaling silica dust emitted by malfunctioning railway equipment. The worker filed his suit within two years of the date on which his disease was diagnosed. The employer argued that the suit was barred by the three-year limitation period in the FELA because the worker contracted the disease more than three years before he filed his suit. This Court rejected that argument, finding that it was inconsistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." 337 U.S. at 170.

The context of that statement shows that the Court considered the worker to be on notice of such an invasion once he learned that he was suffering from a disease attributable to his employment. The Court emphasized that the worker could not be charged with knowledge of the "inherently unknowable" beginnings of his disease—"the slow and tragic disintegration of his lungs" producing symptoms that had "not yet obtruded on his consciousness." *Id.* at 169. Failure to file a suit before the employee could be expected to know he had silicosis, the Court explained, was a failure attributable to "blameless ignorance." *Id.* at 170. But, the Court went on, the afflicted employee could "be held to be 'injured' * * * when the

accumulated effects of the deleterious substance manifested themselves" (*id.* at 170, adopting language from *Associated Indemnity Corp.* v. *Industrial Accident Commission*, 124 Cal.App. 378, 381 (1932)).

Although the question whether the employer in *Urie* had been negligent was hotly contested through two rounds of litigation in the state courts,[12] the Court did not suggest that the limitations period does not begin to run until someone advises a worker suffering from silicosis that the excess of dust in the air was "negligence." The Court instead identified the critical date as the date that the nature of the occupational disease was established. See 337 U.S. at 170. That inquiry usually is a simple one. Applied to this case, it leads to the conclusion that respondent's claim accrued no later than January 1969, when

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[12] The original complaint alleged that excessive amounts of silica dust were released from faultily adjusted sanding devices at the side of the railroad tracks. It also alleged that the devices were of "the usual and customary type," a statement that the Missouri Supreme Court characterized as an admission that the employer had adhered to the customary standards of the trade. The Missouri court had held that the admission was fatal to the statement of a claim of negligence. 337 U.S. at 175-180. This Court observed that the complaint nevertheless presented a jury question whether the employer knew or should have known that existing industry standards were inadequate to protect the health of its workers. *Id.* at 178. (The worker in *Urie* also filed an amended complaint alleging that the employer's equipment maintenance was inadequate and violated the employer's duty under the Boiler Inspection Act, 45 U.S.C. 23 *et seq.*; he obtained a judgment on this claim. 337 U.S. at 167-168. This Court upheld that judgment and accordingly found it unnecessary to remand for trial on the common law negligence issue).

Dr. Sataloff attributed respondent's hearing loss to the neomycin irrigation at the VA hospital. Respondent then had two years to investigate the connection further, obtain medical and legal advice, and file an administrative claim. That respondent waited until January 1973 to file a claim was entirely his own choice.

D. None of the Circumstances of This Case Supports Tolling the Limitations Period

A rule that a malpractice claim accrues within the meaning of 28 U.S.C. 2401(b) when the victim knows that he has been harmed by a particular medical treatment is not unfair to a victim of malpractice. The limitations period does not start running if the victim could not reasonably have discovered the link between his injury and the act producing it. Once the victim connects (or should connect) his injury and its cause, he has two years in which to seek professional advice, to investigate the possibility of recovering damages, and to file a claim if the advice he receives or his own investigations seem to warrant his doing so. This rule does not penalize "blameless ignorance;" it simply encourages the timely investigation of legal rights by victims, which any statute of limitations should do.

The attempt by the courts below to justify their different approach by reference to the facts of this case is unconvincing. The findings here establish that respondent knew, more than two years before he filed his tort claim, that "neomycin was the direct cause of his

hearing loss" (Pet. App. 12a); and respondent has never contended that he was advised by anyone that deafness was an expected risk of the treatment of his leg. Deafness resulting from a leg operation should be enough to put anyone on notice that something is amiss. The court of appeals nonetheless concluded that the running of the limitations period was suspended by a combination of three things: the technical complexity of medical malpractice, the VA's denials of causation, and the failure of respondent's physicians bluntly to tell him that the treatment was malpractice (Pet. App. 11a). The district court, in reaching a similar conclusion, also relied on the VA's denial of legal liability and on respondent's diligence in establishing the factual basis for his disability benefits claim (Pet. App. 54a, 61a). None of these circumstances, however, is material to the date of accrual.

The technical complexity of the malpractice issue in this case hardly distinguishes it from most other personal injury cases.[13] Negligence is a complicated issue requiring the testimony of expert witnesses in a great many tort cases. Moreover, the particular technical issue cited by the district court as justifying

[13] The medical question here is a good deal simpler than those encountered in cases of negligent surgery or negligent anaesthesia, in which the facts about the case may be difficult to ascertain and questions of the probabilities of harm given different approaches to the treatment may abound. The question of liability here is certainly much more simple than the question of liability in a case involving negligent manufacture of a vaccine or negligent design of an automobile.

respondent's failure to investigate the possibility of negligence—the question of "the propensity of the body to absorb a toxic antibiotic under a given mode of administration" (Pet. App. 61a)—was in dispute between the VA and respondent as early as 1969, when he asserted that hearing loss could be produced by the use of neomycin in an irrigation process if high enough blood levels of the drug were reached (see pages 6-7, *supra*). Congress took the "complexity" of tort cases into account in allowing victims two years in which to file a claim. The liberal discovery rules also aid in dealing with complexity. A court cannot properly rely on this same problem to extend the period of limitations. See *Soriano* v. *United States*, *supra*.

The suggestion that the VA's denials of liability warranted suspending the date of accrual until someone advised respondent that the VA's denials might be in error is similarly misguided. Most potential defendants are likey to deny legal liability when confronted with accusations that they have caused harm. To make ordinary denials a basis for postponing the accrual of a claim is to erode substantially the role of statutes of limitations. If a denial of liability postpones the accrual of a claim, any suit is timely so long as it is brought within two years of the most recent allegation and denial. Whatever the proper rule may be when a denial of liability so confuses or lulls a victim as to throw him entirely off the track,[14]

[14] See *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) (fraudulent concealment of important facts justifies tolling of limitations period); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) (inducement by defendant not to sue can justify tolling). This case is a far cry from the fact patterns of *Holmberg* and *Glus*. Moreover, there is a serious question whether even lulling or misleading statements by the government could justify tolling in light of the Tort Claims Act's status as a waiver of sovereign immunity. Cf. *Munro* v. *United States*, *supra*, with *INS* v. *Hibi*, 414 U.S. 5, 8 (1973).

there was no such confusion here. Despite the VA's responses to his claims for benefits, respondent continued to assert that the neomycin irrigation caused his deafness and that the irrigation had been improper (see pages 5-8, *supra*). The VA's conduct thus did not deter or prejudice respondent in any way.

An even less appropriate ground for justifying the rule for accrual applied here is the fact, noted by the court of appeals, that until June 1971 respondent's physicians did not baldly "suggest * * * the possibility of negligence" (Pet. App. 11a). This rationale for postponing accrual simply begs the question, which is whether medical advice on "the possibility of negligence" has anything to do with the date of accrual. If, as we argue, knowledge of harm and causation is enough to start the limitations period running, then the precise date on which a physician first used the magic word "negligence" or "malpractice" is irrelevant. The court of appeals' observation does not establish *why* anything should turn on the date that a physician used a particular word.

Finally, there is the district court's reasoning that respondent's exercise of "all kinds of reasonable dili-

gence in attempting to establish a medical basis for increased disability benefits" militates in favor of finding that his claim did not accrue when he learned the cause of his deafness (Pet. App. 61a). In advancing this argument, the district court misapprehended what kind of diligence is required by any statute of limitations, including the one concerned here. It is beyond dispute that respondent actively pursued his disability benefits claim. Moreover, in pursuing that claim, he performed many of the tasks one would associate with preparation for litigation of a negligence claim. He consulted experts on drugs (A. 35, 81, 106); he gathered affidavits from his associates regarding whether he appeared to have a hearing difficulty before his VA hospitalization (A. 36); he inquired whether the means by which neomycin was administered to him could be expected to produce a hearing loss (A. 121). He did not, however, do what the statute of limitations here was designed to induce a potential litigant to do: he did not promptly file his tort claim. His filing of a claim for disability benefits is not an adequate substitute, and respondent has never contended that it is.[15]

[15] Even assuming that a failure to use Standard Form 95, the form for submitting a tort claim (Pet. App. 30a), is not in itself fatal to the validity of a written claim, the disability benefits application (A. 7) was inadequate as a tort claim because it failed to specify a sum certain. See *Avril* v. *United States*, 461 F.2d 1090, 1091 (9th Cir. 1972); *Bialowas* v. *United States*, 443 F.2d 1047 (3d Cir. 1971). Moreover, respondent's position throughout—a position accepted by the

Respondent's diligence, then, was in pursuing a possibility of compensation by some means other than proceedings under the Federal Tort Claims Act. His aggressiveness in pursuing that possibility, however, cannot excuse him from complying with the time rules of the Tort Claims Act, for pursuit of one remedy is not a ground for tolling the statute of limitations of another. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Although respondent's pursuit of his claim for more disability benefits gave the VA notice that there was some controversy about the use of neomycin to irrigate wounds, and thereby relieved somewhat the evidentiary burden ordinarily imposed by a stale claim, this would not necessarily be so in other cases in which the court of appeals' approach would apply. Moreover, even in this case the government suffered some prejudice; as the district court noted (Pet. App. 60a n.22), the surgeon responsible for the neomycin treatment died before trial.

In sum, the courts below applied the statute of limitations of the Federal Tort Claims Act in a way that undermines its reason for being. If the claim here is timely, many future litigants will be substantially unconstrained by the limitations provision so long as they do not trouble themselves to inquire of anyone

courts below—has been that in none of his filings with the VA in connection with his benefits claim did he ever suggest to the government that he suspected the VA physicians of negligence. See also note 4 *supra*.

whether the injury they have suffered might possibly be the result of a negligence. Such a rule, which makes sleeping on one's rights a reason for extending the time within which to file a claim, is incompatible with the purposes and history of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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